11983, 11984, 11985, 12017. 12018

In the United States Court of Appeals for the Ninth Circuit

No. 11983

VERNON O. TYLER, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION, AND MORRISON-KNUDSEN COMPANY, INC., A CORPORATION, APPELLEES

No. 11984

WILLIAM LESLIE KOHL, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION, AND MORRISON-KNUDSEN COMPANY, INC., A CORPORATION, APPELLEES

No. 11985

ARTHUR J. SESSING, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION, AND MORRISON-KNUDSEN COMPANY, INC., A CORPORATION, APPELLEES

No. 12017

H. A. LASSITER AND W. R. MORRISON, APPELLANTS

v.

GUY F. ATKINSON COMPANY, A CORPORATION, APPELLEE

No. 12018

OWEN J. MCNALLY, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION, AND MORRISON-KNUDSEN COMPANY, INC., A CORPORATION, APPELLEES

THE UNITED STATES OF AMERICA, INTERVENOR

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES AS INTERVENOR

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In the United States Court of Appeals for the for the Ninth Circuit

No. 11983

Vernon O. Tyler, appellant

v.

S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees

No. 11984

William Leslie Kohl, appellant

v.

S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees

No. 11985

Arthur J. Sessing, appellant

v.

S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees

No. 12017

H. A. Lassiter and W. R. Morrison, appellants

v.

Guy F. Atkinson Company, a corporation, appellee

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THE UNITED STATES OF AMERICA, INTERVENOR

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF THE UNITED STATES AS INTERVENOR

STATEMENT

(a) The nature of the cases and interest of the United States as Intervenor

The Appellants in the above actions are or were employees of Appellees and sued for overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938. The instant appeals have been taken from the judgments of the District Court wherein the actions were dismissed, on the ground that Appellees had pleaded and proved defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947.

Pursuant to the Act of August 24, 1937, c. 754, § 1, 50 Stat. 751, 28 U. S. C. § 2403, the United States intervened in the cases in support of the constitutionality of the Portal Act. In view of the limited nature of the intervention, the Government in these cases, as in others, takes no position as to any issues

relating to the factual applicability of the Act beyond discussing the meaning of its sections to the extent deemed relevant to the constitutional questions. While this brief deals primarily with the arguments that have been advanced by Appellants in these cases, it is not confined to such arguments but covers as well all respectable arguments that have thus far come to our attention in connection with litigation involving attacks upon the constitutionality of the Portal Act throughout the country. Accordingly, a mere reference to a contention that the Act is unconstitutional will not necessarily imply that the present Appellants have advanced or rely upon it.

(b) The statutes involved

Pertinent excerpts from the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84, 29 U. S. C. § 251–262) and the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; as amended, 29 U. S. C., § 201–219) appear at appropriate points in the brief, *infra*.

(c) Court decisions under the Portal-to-Portal Act of 1947

The constitutionality of the Act has been upheld by six United States Courts of Appeals [1] and by more

[1] *Rogers Cartage Co.* v. *Reynolds*, 166 F. (2d), 317 (C. A. 6); *Seese* v. *Bethlehem Steel Co.*, 168 F. (2d) 58 (C. A. 4); *Battaglia* v. *General Motors Corporation*, 169 F. (2d) 254 (C. A. 2); *Darr* v. *Mutual Life Insurance Company*, 169 F. (2d) 262 (C. A. 2); *Fisch* v. *General Motors Corporation*, 169 F. (2d) 266 (C. A. 6); *Role* v. *J. Neils Lumber Company*, 171 F. (2d) 706 (C. A. 9); *Lee* v. *Hercules Powder Company*, 16 Labor Cases, par. 64,920, 8 WH Cases 486 (C. A. 7); *McDaniel* v. *Brown & Root, Inc.*, 16 Labor Cases, par. 64,932, 8 WH Cases 487 (C. A. 10); *Potter* v. *Kaiser Co.*, 171 F. (2d) 705 (C. A. 9).

than a hundred decisions of Federal District Courts.[2] with possibly two exceptions,[3] we are aware of no decisions to the contrary. The Supreme Court has denied petitions for certiorari in the following cases: *Battaglia* v. *General Motors Corporation,* 335 U. S. 887; *Darr* v. *Mutual Life Insurance Company of New York,* 335 U. S. 871; *Cingrigrani* v. *B. H. Hubbert & Son, Inc.,* 335 U. S. 868; *Fisch* v. *General Motors Corporation,* 335 U. S. 902.[4]

ARGUMENT

The portions of the Portal-to-Portal Act affecting monetary claims in existence at the time of its enactment are constitutional notwithstanding their substantive validity under earlier legislation

The portions of the Portal-to-Portal Act affecting existing claims under the Fair Labor Standards Act are Sections 2, 3, 6, 8, 9, 11, and 12. The sections under attack in the instant cases are Sections 9 and 11. Since most of the arguments and authorities relating to the so-called "retroactive" changes made in the substantive law by these sections are applicable to each of them, all contentions advanced under this point in the brief are intended to apply equally to Sections 9 and 11, except where a contrary intention plainly appears.

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[2] The reported District Court decisions are listed in the Appendix, *infra.*

[3] *Sveltik* v. *Vultee Aircraft Corp.* (D. C., N. Tex.), 7 WH Cases 282, 13 Labor Cases, par. 64,063; *Curtis* v. *McWilliams Dredging Co.* (N. Y. City Ct.), 14 Labor Cases, par. 64,352, 7 WH Cases 757.

[4] The following two cases were remanded by the Supreme Court for reconsideration because of the enactment of the Portal Act: *Alaska Juneau Gold Mining Co.* v. *Robertson,* 331 U. S. 793; *Madison Ave. Corp.* v. *Asselta,* 331 U. S. 795.

1. The applicable provisions of the Portal-to-Portal Act are limited in operation to purely statutory claims

In view of the extravagant contentions as to the destructive effect of the Portal-to-Portal Act upon the rights of employees which have been advanced by those attacking the constitutionality of the Act, it seems well at the outset to examine briefly the nature of the claims affected by the legislation.

Section 6 of the Fair Labor Standards Act (29 U. S. C. § 206) requires every employer to pay to each of his employees who is engaged in commerce or in the production of goods for commerce not less than certain minimum wages. Section 7 of that Act (id., § 207) provides in part as follows:

> (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * [for a workweek longer than 44, 42 or 40 hours as the case may be] * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

For violations of the Act in respect of its minimum wage and overtime compensation provisions, Section 16 (id., § 216), in addition to criminal penalties, made employers civily liable to employees as follows:

> (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall

> be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages.

It is clear that, insofar as claims arising under the Fair Labor Standards Act are concerned, Sections 2, 9, and 11 of the Portal-to-Portal Act of 1947 were addressed exclusively to claims which came into being solely as a consequence of the enactment of Section 16 of the Fair Labor Standards Act.

Section 2 of the Act is, in relevant part, as follows:

> (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
>
> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in

effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

Sections 9 and 11 of the Portal-to-Portal Act are as follows:

SEC. 9. *Reliance on Past Administrative Rulings, Etc.*—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * * *

SEC. 11. *Liquidated Damages.*—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to

> such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

Sections 2, 9, and 11 plainly refer to liability arising "*under* the Fair Labor Standards Act of 1938, as amended." [Italics supplied.]

It will be observed that Congress does not attempt in any way to interfere with the enforcement of claims other than those sought to be asserted *under* its prior legislation. Its provision is that "no employer shall be subject to any liability * * * *under* the Fair Labor Standards Act of 1938, as amended" [italics supplied]. Therefore, any claim which can be asserted independently of the prior legislation is, to that extent, not affected by the Act. Moreover, claims based upon activities which were compensable under express provisions of written or unwritten contracts, or by custom or practice, continue to be enforceable *under* Section 2 of the Act. Accordingly, there can be no merit to any contention that the Portal-to-Portal Act is unconstitutional because the claims that it purports to bar are contract claims.

That Sections 2, 9, and 11 were intended to affect only purely statutory claims is made evident not only by their language but by reference to the Congressional findings and policy in Section 1, in part, as follows:

> The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, * * * (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; * * *.

By Section 2 of the Act, the Congress relieved employers of liability on claims asserted "*under* the Fair Labor Standards Act" [italics supplied], unless based upon activities which were *compensable* under either contract or custom. In other words, the Congress was willing to decide, as a matter of legislative policy, that the liabilities affected by Section 2 of the Act were unexpected, since the activities themselves had never been regarded as compensable; but obviously it was unable to make that decision as to claims affected by Sections 9 and 11. Instead, the Congress there placed upon the employer the burden of proving to the court that his violation "was in good faith in conformity with and in reliance on" a ruling of an agency of the United States. Cf. *Anderson* v. *Mt. Clemens Pottery Co.* (D. C. E. D., Mich., 1947), 69 F. Supp. 710, 712, 719–721. In both cases, however, it is clear that it was the intention of the Congress

to relieve employers of "unexpected liabilities" arising retroactively, in effect, as a consequence of subsequent interpretations of Congressional legislation.

In other words, if any such claim rests sufficiently upon contract that it may be enforced independently of the Fair Labor Standards Act, its enforcement in that manner is in no way barred by the Portal-to-Portal Act. However, it is clear that employers are relieved of liability on claims, which rest upon prior legislation, coming within the coverage of such sections unless the Congress, for some reason, lacks constitutional power to withdraw the support of earlier legislation.

2. The Portal-to-Portal Act is constitutional as an exercise of the plenary power of the Congress to withdraw and modify rights conferred exclusively by its prior legislation

As indicated above, by the Portal-to-Portal Act the Congress has not sought to disturb any claim to any extent that it does not rest exclusively upon its prior legislation in the sense that it would be valid apart from such legislation. In other words, any claim based upon contract, to the extent that it can be enforced in a contract action without reliance upon the Fair Labor Standards Act, can be enforced in such an action notwithstanding the provisions of Sections 2, 9, and 11 of the Portal-to-Portal Act. The Congress has found that the Fair Labor Standards Act has been interpreted so as to create unexpected liabilities under which employees would receive "windfall payments * * * for activities performed by them without any expectation of reward

beyond that included in their agreed rates of pay." (Sec. 1.) These are the claims that the Congress obviously intended to reach and to bar by the Act. As to employees such uncontracted for benefits were purely statutory[5] and can be likened to statutory gratuities. As to employers such unexpected liabilities can be likened to statutory penalties.[6]

Of course, the Congress may terminate statutory gratuities and penalties at any time. The mere repeal of a statute providing for penalties, without a saving clause, terminates prior liability thereunder. *Norris* v. *Crocker,* 13 How. 429, 440. See also *United States* v. *Chambers,* 291 U. S. 217, 222–226 (and authorities there cited). And, in absence of contractual obligation, statutory gratuities may be withdrawn at any time at the will of the Congress. See and cf. *Norris*

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[5] See, e. g., *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603; *Jewell Ridge Corporation* v. *United Mine Workers*. 325 U. S. 161, 167; *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 704.

[6] The civil liabilities to employees imposed by the Fair Labor Standards Act upon "Any employer who violates" its provisions (29 U. S. C. § 216 (b) had two distinct, if integrated, purposes, i. e., (1) to enforce its provisions relative to minimum wages and maximum hours (id. §§ 206 and 207) and (2) to provide for the payment of fair compensation to employees. Accordingly, while the benefits conferred upon employees are personal to them, they are nonetheless enforcement provisions of the Act which could not be contracted away. See and cf., e. g., *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697. Inasmuch as the benefits in question came as a "windfall" to employees, they may be regarded as pure statutory benefits subject to the further exercise of the legislative power that brought them into being—and, in respect of the enforcement aspects of the liabilities thus imposed upon employers, they obviously have all the attributes which make penalties equally subject to the legislative will.

v. *Crocker, supra; Lynch* v. *United States,* 292 U. S. 571, 577 (and cases there cited).

As stated by the Supreme Court in the case of *Flanigan* v. *Sierra County,* 196 U. S. 553, 560:

> The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland on Statutory Construction,* § 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. *9 Bacon's Abridgement, 226.*

Accordingly, it is clear that rights arising from and depending upon legislation alone may be terminated at the will of the legislative body.[7] For this reason the United States Circuit Court of Appeals for the

[7] See and cf. *Louisiana* v. *Mayor*, 109 U. S. 285, 287–288; *McNair* v. *Knott*, 302 U. S. 369, 372–374 (and cases there cited); *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 311–312, 314–316; *In re Hall*, 167 U. S. 38, 42; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 124.

The modification by Section 11 of the Portal-to-Portal Act of the provision for liquidated damages, to permit their judicial reduction or elimination is, of course, similar to retroactive reduction of interest to be included in judgments and is clearly valid for the same reasons. See, *Morley* v. *Lake Shore Co.*, 146 U. S. 162, 168–169. Cf. *Funkhouser* v. *Preston Co.*, 290 U. S. 163, 167–168; *Waggoner* v. *Flack*, 188 U. S. 595, 602–605; *League* v. *Texas*, 184 U. S. 156, 158–159; *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, 439.

The mere fact that a *statutory* claim or defense may be in litigation, either in the trial court or on appeal, does not remove it from the reach of legislation otherwise valid. Cf. *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 26–27; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 108–110; *Western Union Telegraph Co.* v. *Louisville & Nashville Ry.*, 258 U. S. 13, 19–22. Cf. *Hodges* v. *Snyder*, 261 U. S. 600, 603–604.

Sixth Circuit found Sections 9 and 11 of the Portal-to-Portal Act to be constitutional in *Rogers Cartage Co.* v. *Reynolds,* 166 F. (2d) 317, saying:

> Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, 703. *American Power & Light Co.* v. *Securities & Exchange Commission,* 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co.* v. *Louisville & Nashville Ry. Co.,* 258 U. S. 13; *Kline* v. *Burke,* 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle* v. *Electric Metallurgical Co.,* 72 Fed. Supp. 21.

The Court of Appeals for the Second Circuit ruled similarly in *Darr* v. *Mutual Life Insurance Company of New York,* 169 F. (2d) 262; certiorari denied, 335 U. S. 871.

For the same reason the Court of Appeals for the Fourth Circuit, in *Seese* v. *Bethlehem Steel Co.,* 168 F. (2d) 58, held that Section 2 of the act is constitutional. In so ruling, the Court, among other things, said:

What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. *Missel* v. *Overnight Transportation Co.,* 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697. Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. *Norris* v. *Crocker,* 13 How. 429; *Ewell* v. *Daggs,* 108 U. S. 143, 151; *Pearsall* v. *Great Northern R. Co.,* 161 U. S. 646; *A. C. L. R. Co.* v. *Goldsboro,* 232 U. S. 548; *West Side R. Co.* v. *Pittsburg Const. Co.,* 219 U. S. 92; *National Carloading Corp.* v. *Phoenix-El Paso Express, supra.* The reason underlying the rule was stated by Mr. Justice Matthews in *Ewell* v. *Daggs, supra,* as follows:

"And these decisions rest upon solid ground. * * * The more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms

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no element in the rights that inhere in the contract."

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. *West Side R. Co.* v. *Pittsburgh Const. Co.*, 219 U. S. 92; *McNair* v. *Knott,* 302 U. S. 369, 372. In other words, the contracts of employment which contemplated that no payment should be made for the portal-to-portal activities but that these were to be compensated by the agreed wage, were invalid only because of the provisions of the Fair Labor Standards Act. There was nothing in law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Banking Associations was validated by retroactive legislation in the case of *McNair* v. *Knott, supra.*

Plaintiffs rely upon such cases as *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Ettor* v. *City of Tacoma,* 228 U. S. 148; *Coombes* v. *Getz,* 285 U. S. 434; and *Duke Power Co.* v. *South Carolina Tax Comm'n,* 4 Cir. 81 F. 2d 513; but these cases are not in point. They were concerned with vested property rights based on agreements and not on mere statutory pro-

> visions without contract or agreement to support them. * * *

Among the cases thus distinguished are those upon which chief reliance is placed by the appellants.[8]

However, in a number of the cases in which the constitutionality of the Portal-to-Portal Act has been challenged, the suggestion has been advanced that while the claims barred by Sections 2, 9, and 11 of the Act may not be contract claims in the pure sense, they nonetheless partake of the contract of employment because all contracts are entered into with implied reference to the existing laws bearing upon the contractual relationship. In the *Seese* case, *supra,* the Court answered this contention as follows:

> It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal-to-Portal Act is that that act validates the real contract be-

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[8] In the *Ettor* case, for example, the existence of the statute reasonably tended to assure the property owner that he would be reimbursed for damage so that his failure to take protective measures, in *reliance* thereon, constituted a change of position in a contractual sense. (Cf. discussion of these cases in *McLaughlin* v. *Todd & Brown, Inc.*, D. C. Ind., 7 WH Cases 1014.) Here, however, the "rights" were wholly of statutory creation; were not given in substitution for either a contract or property right which otherwise would have been received or would have continued to exist; and "this is not a case where appellants' conduct would have been different if the present rule had been foreseen" (*Chase Securities Corp.* v. *Donaldson*, *supra*, 316).

> tween the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.

It is a predicate of the Act in question that there must have been no consciousness of intention on the part of the contracting parties that the amounts sued for should be paid. Accordingly, the only implied-in-fact agreement on the part of the employer and his employees, which could be said to have a bearing on the matter, would be their implicit agreement to comply with the provisions of the Fair Labor Standards Act as they might thereafter be interpreted by competent authority. However, it is unthinkable that an employer would have intended to bind himself to adhere to an adverse interpretation beyond the period of time that he was under legal obligation to do so.

Any suggestion that interpretations subsequently placed upon the Fair Labor Standards Act became irretrievable parts of each employment contract by force of law should be equally fruitless. "Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435.

No provision of the Fair Labor Standards Act required either implied or actual incorporation of its

terms by parties to such a contract, as terms of the agreement, in such form that later congresses would be unable to alter the conditions of the employment relationship without abrogating the contract provisions.[9] Any attempt on the part of one Congress so to tie the hands of a future Congress would obviously be open to most serious question on constitutional grounds. (See and cf., e. g., *Lynch* v. *United States,* 292 U. S. 571; *North American Com. Co.* v. *United States,* 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 463; *Boyd* v. *Alabama,* 94 U. S. 645, 650; *Stone* v. *Mississippi,* 101 U. S. 814, 817–818; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548, 558.) Plainly no such result was intended and the Act cannot properly be given that effect. Cf. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577.

Accordingly, it is clear that insofar as rights given by the Fair Labor Standards Act have not, in fact,

[9] Bearing in mind the fact that Sections 2, 9, and 11 relieve employers of no liabilities, unless they were unexpected, it is evident that there is no basis for the application of cases holding that existing rights of enforcement, which have been appended to contracts by state law, and which were presumably known to and relied upon by the parties, became parts of the obligation of contracts which the states are forbidden to impair. See, e. g., *Coombes* v. *Getz*, 285 U. S. 434, 442; *Hawthorne* v. *Calef*, 2 Wall. 10, 22–23 (cf. *Ochiltree* v. *Railroad Co.*, 21 Wall. 249, 252–254); *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 194. Cf. *McCullough* v. *Virginia*, 172 U. S. 102, 122–125; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170, 198; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 435; *Pritchard* v. *Norton*, 106 U. S. 124, 132, 136–137; *Chase Securities Corp.* v. *Donaldson*, *supra*, 315–316; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332; *Vance* v. *Vance*, 108 U. S. 514, 518–522.

become terms of employment contracts, they may be withdrawn by the Congress. Sections 2, 9, and 11 of the Portal-to-Portal Act of 1947, go no further and are clearly constitutional.

3. The Congress had constitutional authority to abrogate the claims in question in order to accomplish legitimate public purposes through the exercise of its interstate commerce power

Even without its plenary power to terminate the purely statutory claims involved by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce. This would be so even if the claims were not purely statutory, but, as appellants suggest, in some fashion partake of the employment agreement.

Article I, Section 8, of the Constitution gives to the Congress the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Under Section 1 of the Portal-to-Portal Act of 1947 the Congress has found that the continued validity of the subject claims would "constitute a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce." And it has declared it to be its policy "to relieve and protect interstate commerce from practices which burden and obstruct it." There can be no question as to the constitutional validity of the end sought to be reached by the Congress. This is the same end that was sought through the enactment of the Fair Labor Stand-

ards Act, upon which the claims now in question depend, the validity of which Act has been established beyond question. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 576–577; *United States* v. *Darby,* 312 U. S. 100; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126.

Of course, it is primarily for the Congress to determine whether and to what extent the existence of such claims interferes with the legislative objective. *Norman* v. *Baltimore & Ohio R. R. Co.,* 294 U. S. 240, 311–313. There can be no serious question that the findings and policy of the Congress amply support the measures taken by it in Sections 2, 9, and 11 of the Portal-to-Portal Act. And it is clear that the Congress is not required to ignore one classification of related claims merely because the major objective might have been achieved by confining the legislation to certain other classifications. *Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324, 340, 341.

While Section 10 of Article 1 of the Constitution provides that "No State shall * * * pass any * * * law impairing the obligation of Contracts" and "does not in terms restrict Congress and the United States" (*New York* v. *United States,* 257 U. S. 591, 601), it is clear that contract rights, like other property rights, are protected by the Fifth Amendment. *Omnia Co.* v. *United States,* 261 U. S. 502, 508; cf. *Louisville Joint Stock Bank* v. *Radford,* 295 U. S. 555, 589; *Wright* v. *Vinton Branch,* 300 U. S. 440, 457. However, it is equally clear that, like other property rights, their ownership is conditioned and subject to the possibility of uncompensated destruc-

tion through the valid exercise of Congressional powers. *Omnia Co.* v. *United States, supra,* 508–510. All contractual relationships between private parties are entered into not only subject to the existing laws of the United States but, as well, to the changes which the Congress may validly make in such laws. Thus in *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, where for valuable consideration a contract had been made to issue free transportation to an individual, the railroad company was thereafter relieved of liability thereunder by an act of Congress interdicting the use of "free transportation." In so holding the Court (at p. 482) said:

> Long before the above cases were decided, it was said in *Knox* v. *Lee,* 12 Wall. 457, 551, that "as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of contract can extend to the defeat of legitimate Government authority."

Again in upholding the validity of congressional action in abrogating gold clauses in private bonds the Supreme Court, through Mr. Chief Justice Hughes, in *Norman* v. *Baltimore & Ohio R. R. Co., supra* (at p. 307), said:

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies

> within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.[10]

In *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577, with reference to the constitutional applicability of the overtime provisions of the Fair Labor Standards Act to a contract of release there involved, the Supreme Court, through Mr. Justice Reed, stated:

> If overtime pay may have this [beneficial] effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 306–311.

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[10] Attempts to distinguish the *Norman* case, upon the grounds that the creditor could still collect in dollars—hence no property was taken from him—lose sight of the fact that the decision applied as well to "gold value" contracts as to contracts for payment in gold. See the *Norman* case, *supra*, at pp. 298–302; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, 259–261. The legislation struck down contracts for payment of greater sums of money to be measured by the increased money value of a quantity of gold as well as contracts calling for payment in *speci. Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324, 334, 337–340. By reason of the enactment of the legislation the beneficiaries of "gold clause" obligations became entitled to fewer dollars than they had had a contract right to receive prior to its enactment. The *Norman* case is clearly in point.

Likewise, arguments to the effect that the doctrine of the *Norman* case was overruled *sub silentio* by the later decision in *Louisville Bank* v. *Radford*, *supra*, are conclusively refuted by the still later decisions in the other cases cited in this note, *supra*.

So far as we are aware, the doctrine of the above-mentioned cases has never been characterized by the Supreme Court as an "emergency doctrine," nor has it been applied unfrequently and merely to deal with emergencies, as appellants suggest. On the contrary, it inheres in the Constitution itself and has found frequent and varied expression in the decisions of the Supreme Court throughout the years.[11]

Since the rights which have been found to have been given employees by the Fair Labor Standards Act did not involve any pledge of "the credit of the United States" (*cf. Perry* v. *United States,* 294 U. S. 330, 350–351; *Lynch* v. *United States,* 292 U. S. 571), the employees' position to resist the exercise of the interstate commerce power by the Congress, through the Portal-to-Portal Act, certainly is not improved by the fact that their claims depend for validity upon prior legislation of the Congress rather than upon contracts. As previously indicated, the Congress has plenary power to withdraw benefits conferred by and resting exclusively upon its prior

[11] In addition to the numerous cases cited in the opinion of the Supreme Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, *supra*, pp. 307–311, see and compare *Fleming* v. *Rhodes*, 331 U. S. 100, 107; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, 258–259; *American Power Co.* v. *S. E. C.*, 329 U. S. 99–100, 103–104; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 435; *DeLaval Steam Turbine Co.* v. *U. S.*, 284 U. S. 61, 73; *Mitchell* v. *Clark*, 110 U. S. 633, 643; *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38–41; *Calhoun* v. *Massie*, 263 U. S. 170, 175–176; *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 516; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429–430; *North American Co.* v. *S. E. C.*, 327 U. S. 686, 707–708; *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324, 341; *Bowles* v. *Willingham*, 321 U. S. 503, 516–519; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 405.

legislation. Moreover, in absence of the exercise of a constitutional power requiring the assumption of a continuing obligation on the part of the United States, an earlier Congress may not validly restrict later Congresses in the exercise of their constitutional powers. See *Lynch* v. *United States, supra,* 579; *North American Com. Co.* v. *United States,* 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 463.

It follows that, even if the rights conferred by the Fair Labor Standards Act could be regarded as "vested" rights in the same sense that contract rights are "vested" rights, the Congress could constitutionally terminate them in the exercise of its power to regulate interstate commerce.

CONCLUSION

For the foregoing reasons the decisions of the Court herein should sustain the constitutionality of the Portal-to-Portal Act of 1947.

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APPENDIX A

REPORTED DECISIONS OF UNITED STATES DISTRICT COURTS SUSTAINING THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947 [1]

Ackerman v. *J. I. Case Co.* (Wisconsin), 74 F. Supp. 639.

Adkins v. *E. I. duPont de Nemours & Co.* (Oklahoma), 13 Labor Cases, par. 64025, 7 WH Cases 298.

Alameda v. *Paraffine Co., Inc.* (California), 75 F. Supp. 282.

Asselta v. *149 Madison Ave. Corporation* (New York), 79 F. Supp. 413.

Bateman v. *Ford Motor Co.* (Mich.), 76 F. Supp. 178; affirmed 169 F. (2d) 266; certiorari denied, 335 U. S. 902.

Bauler v. *Pressed Steel Car Company, Inc.* (Illinois), 15 Labor Cases, par. 64569, 8 WH Cases 55.

Blessing v. *Hawaiian Dredging Co.* (Dist. of Col.), 76 F. Supp. 556.

Boehle v. *Electro Metallurgical Co.* (Oregon), 72 F. Supp. 21.

Boerkoel v. *Hayes Mfg. Corporation* (Michigan), 76 F. Supp. 771.

Bonner v. *Elizabeth Arden* (New York), 13 Labor Cases, par. 64147, 7 WH Cases 469.

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[1] In addition to the cases appearing in this list, and not counting the 267 portal-pay suits dismissed within six weeks after the enactment of the Portal-to-Portal Act (1947 WH 1632), we have been advised of more than 100 District Court decisions dismissing such suits as to which we have been unable to locate published reports.

Borucki v. *Continental Baking Co.* (New York), 74 F. Supp. 815.

Breusing v. *Fisher Body Division* (Missouri), 74 F. Supp. 541.

Bumpus v. *Remington Arms Co.* (Missouri), 74 F. Supp. 788.

Burfeind v. *Eagle Picher Co. of Texas* (Texas), 71 F. Supp. 929.

Cardinale v. *General Motors Corp.* (Georgia), 13 Labor Cases, par. 64,088, 7 WH Cases 378.

Cochran v. *St. Paul & Tacoma Lumber Co.* (Washington), 73 F. Supp. 288.

Colvard v. *Southern Wood Preserving Co.* (Tennessee), 74 F. Supp. 804.

Darr v. *Mutual Life Insurance Company of New York* (New York), 78 F. Supp. 28; affirmed 169 F. (2d) 262; *certiorari* denied, 335 U. S. 871.

DeMaio v. *Grant Storage Battery Co.* (Minnesota), 14 Labor Cases, par. 64,285, 7 WH Cases 721.

Ditto v. *American Aluminum Co.* (California), 73 F. Supp. 955.

Donovan v. *Republic Steel Corp.* (New York), 14 Labor Cases, par. 64,295, 7 WH Cases 644.

Etting v. *North American Aviation, Inc. of Kansas* (Kansas), 13 Labor Cases, par. 64,154, 7 WH Cases 491.

Ferrer v. *Waterman Steamship Corporation* (Puerto Rico), 76 F. Supp. 601.

Glowienke v. *Hawaiian Dredging Co.* (Illinois), 14 Labor Cases, par. 64,343, 7 WH Cases 637.

Grazeski v. *Federal Shipbuilding & Dry-Dock Co.* (New Jersey), 76 F. Supp. 845.

Hart v. *Aluminum Co. of America* (Pennsylvania), 73 F. Supp. 727.

Hassel v. *Standard Oil Company* (Ohio), 15 Labor Cases, par. 64,593, 8 WH Cases 41.

Hays v. *Hercules Powder Co.* (Missouri), 13 Labor Cases, par. 64,123, 7 WH Cases 381.

Holland v. *General Motors Corp.* (New York), 75 F. Supp. 274; affirmed 169 F. (2d) 254; *certiorari* denied, 335 U. S. 887.

Hollingsworth v. *Federal Mining & Smelting Co.* (Idaho), 74 F. Supp. 1009.

Hornbeck v. *Dain Mfg. Co.* (Iowa), 13 Labor Cases, par 64,005, 7 WH Cases 296.

Jackson v. *Northwest Airlines, Inc.* (Minnesota), 76 F. Supp. 121.

Johnson v. *Park City Consol. Mines Co.* (Missouri), 73 F. Supp. 852.

Kam Koon Wan v. *E. E. Black, Limited* (Hawaii), 75 F. Supp. 553.

Kirkham v. *Pacific Gas & Electric Co.* (California), 13 Labor Cases, par. 64,199, 7 WH Cases 582.

Lasater v. *Hercules Powder Co.* (Tennessee), 73 F. Supp. 264, affirmed, 171 F. (2d) 263.

Local 626, Etc. General Motors Corp. (Connecticut), 76 F. Supp. 593.

Lockwood v. *Hercules Powder Company* (Missouri), 78 F. Supp. 716.

McCalpin v. *Magnus Metal Corporation* (Illinois), 15 Labor Cases, par. 64,633, 8 WH Cases 120.

McLaughlin v. *Todd & Brown, Inc.* (Indiana), 7 WH Cases 1014.

Markert v. *Swift & Co.* (New York), 13 Labor Cases, par. 64,145, 7 WH Cases 459.

May v. *General Motors Corporation* (Georgia), 73 F. Supp. 878.

Miller v. *Howe Sound Mining Company* (Washington), 77 F. Supp. 540.

Moeller v. *Atlas Powder Co.* (Connecticut), 76 F. Supp. 707.

Moeller v. *Eastern Gas and Fuel Associates* (Massachusetts), 74 F. Supp. 937.

Plummer v. *Minneapolis-Moline Power Implement Co.* (Minnesota), 7 WH Cases 662.

Quinn v. *California Shipbuilding Corp.* (California), 76 F. Supp. 742.

Reid v. *Day & Zimmerman, Inc.* (Iowa), 73 F. Supp. 892.

Role v. *J. Neils Lumber Co.* (Montana), 74 F. Supp. 812; affirmed 171 F. (2d) 706 (C. A. 9).

Sadler v. *W. S. Dickey Clay Mfg. Co.* (Missouri), 73 F. Supp. 690.

Seese v. *Bethlehem Steel Co.* (Maryland), 74 F. Supp. 412; affirmed 168 F. (2d) 58.

Sinclair v. *U. S. Gypsum Co.* (New York), 75 F. Supp. 439.

Smith v. *American Can Co.* (Illinois), 14 Labor Cases, par. 64,281, 7 WH Cases 603.

Smith v. *Colorado Fuel & Iron Corporation* (Colorado), 15 Labor Cases, par. 64,755, 8 WH Cases 307.

Smith v. *Cudahy Packing Co.* (Minnesota), 73 F. Supp. 141 (76 F. Supp. 575).

Sochulak v. *American Brake Shoe Co.* (New York), 79 F. Supp. 437.

Sparacino v. *Colgate Aircraft Corp.* (New York), 13 Labor Cases, par. 64,152, 7 WH Cases 397.

Story v. *Todd Houston Shipbuilding Corp.* (Texas), 72 F. Supp. 690.

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